Michael A. Newdow v. United States of America

GOODWIN, Circuit Judge:

Michael Newdow appeals a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

U.S. Circuit Court of Appeals for the Ninth Circuit, 328 F.3d 446 (2002).

Factual and Procedural Background

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary

school class [shall] recite the pledge of allegiance to the flag once each day."

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." On June 14, 1954, Congress amended Section 172 to add the words "under God" after the word "Nation." The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge. Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. . . . District Judge Milton L. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed. . . .

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion". . . . Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman* 403 U.S. 602, 612–13 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); and the "coercion" test first used by the Court in *Lee v. Weisman* 505 U.S. 577 (1992).

In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion.

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. . . .

[W]e will analyze the school district policy and the 1954 Act under all three tests.

We first consider whether the 1954 Act and the EGUSD's policy of teacher-led Pledge recitation survive the endorsement test. The magistrate judge found that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." Supreme Court precedent does not support that conclusion.

In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgement that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic.

Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. The Court noted that the school district was compelling the students "to declare a belief," and "require[ing] the individual to communicate by word and sign his acceptance of the political ideas [the flag] . . . bespeaks." "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." The Court emphasized that the political concepts articulated in the Pledge[1] were idealistic, not descriptive: "'[L]iberty and justice for all,'" if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Similarly, the policy and the Act fail the coercion test. Just as in *Lee*, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. . . .

Although the defendants argue that the religious content of "one nation under God" is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students. Furthermore, under *Lee*, the fact that students are not required to participate is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement "one nation under God" has a coercive effect. The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words "under God" in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." Therefore, the policy and the Act fail the coercion test.

Finally we turn to the *Lemon* test, the first prong of which asks if the challenged policy has a secular purpose. Historically, the primary purpose of the 1954 Act was to advance religion, in conflict with the first prong of the *Lemon* test. The federal defendants "do not dispute that the words 'under God' were intended" "to recognize a Supreme Being," at a time when the government was publicly inveighing against atheistic communism. Nonetheless, the federal defendants argue that the Pledge must be considered as a whole when assessing whether it has a secular purpose. They claim that the Pledge has the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."

[T]he legislative history of the 1954 Act reveals that the Act's *sole* purpose was to advance religion, in order

to differentiate the United States from nations under communist rule. . . . Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of other religions, but also of religion at the expense of atheism.

Similarly, the school district policy also fails the *Lemon* test. Although it survives the first prong of *Lemon* because, as even Newdow concedes, the school district had the secular purpose of fostering patriotism in enacting the policy, the policy fails the second prong. . . . Given the age and impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God. Therefore the policy fails the effects prong of *Lemon*, and fails the *Lemon* test. In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.

In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause. The judgment of dismissal is vacated with respect to these two claims, and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.

Endnote

[1] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

Study Questions

1. On what grounds does the court in *South Florida Free Beaches* reject the plaintiff's argument that public nudity is a constitutionally protected form of expression?
2. How would you decide *South Florida*? Is nude sunbathing expressive conduct? Does it convey a message? What message were the plaintiffs in the case allegedly conveying? Is that a message that the reasonable viewer is likely to understand when confronted by public nudity? Should public nudity be regarded as a form of "symbolic" speech?
3. What interests can the City of Miami invoke to justify the ban on nude sunbathing in public?
4. Mill insists that even false speech must be tolerated in a free society. What grounds does Mill give for this claim?
5. Mill claims that liberty should not be restricted unless the actor threatens harm to others. What clues does Mill give as to how he thinks "harm" should be interpreted?
6. Mill rests his case for the "harm principle" on a utilitarian moral and social theory: The harm principle is "right" just because it promotes the greatest good for society overall (or at least more good than any other arrangement). Can you see problems in attempting to justify such a stringent principle on utilitarian grounds?
7. How does Devlin determine when something becomes a matter of public morality? Is the reaction of the average person on the street a reliable indicator that some standard is central to the public morality?
8. Is Devlin making a utilitarian argument that government has a right to promote virtue and condemn vice only where this will promote the good of social cohesion? Or is he arguing that society has a right to instill virtues irrespective of utility?
9. Some people would argue that the rise in divorce rates and the breakdown of the traditional nuclear family in America in the decades since Devlin wrote have contributed to a variety of other social ills: growing poverty, child neglect, increasing juvenile delinquency, joblessness, drug use, and so on. Do these trends (if correctly perceived) support Devlin's argument about the centrality of the institution of marriage to the public morality?
10. Consider the following cases: (a) You enjoy listening to rap music, particularly music by rap groups that use what some people would consider violent and lewd lyrics. Your neighbor Joe knows that you listen to such music nightly (he never hears it, though, as you never play it too loudly), and this knowledge drives him to distraction. Joe hates rap music. He believes it is the root of all evil. He can't sleep at night because he is lying awake greatly distressed by the thought that you